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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1067

ANNIE MCMILLAN, as personal representative of the Estate of EDGAR MCMILLAN, deceased, and on behalf of herself, individually,

Petitioner,

v.

MARINE SULPHUR SHIPPING CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The unanimous opinion of the Court of Appeals for the Second Circuit is reported at 607 F.2d 1034.

QUESTION PRESENTED

Petitioner's phrasing of the questions said to be presented by this petition obscures what, in reality, is the only issue before this Court. Properly viewed, the sole question presented for this

Court's consideration, and that question a narrow one of interest only to the parties to this action, is:

> Did the Court of Appeals err in finding that there was no evidence from which the jury could find that respondent acted in a negligent manner?

STATEMENT

The pertinent facts are set out in detail in the opinion of the Court of Appeals (607 F.2d at 1035-1036; Petition ("Pet.") Appendix ("App.") A at 4-a to 7-a) and need not be repeated here.

ARGUMENT

Petitioner's arguments to this Court stem in their entirety from her disagreement with the conclusion of the Court of Appeals that there was no evidence from which the jury could infer that respondent was negligent. Thus, none of the petitioner's contentions presents any broad question of general importance beyond the resolution of this specific controversy. For this reason alone, certiorari should be denied. *United States* v. *Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924); *Houston Oil Co. of Texas* v. *Goodrich,* 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918). *See also Felts* v. *Seaboard Coast Line R. Co.* and *Adkins* v. *Kelly's Creek R. Co.,* 409 U.S. 926, 93 S.Ct. 224, 34 L.Ed.2d 184 (1972); Speech of Chief Justice Fred M. Vinson before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi; Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978) §4.14.

In any event, it is clear that the petition is utterly devoid of merit.

Though petitioner's theory of negligence was never precisely identified at trial, she appeared to take the position that

those in charge of the aft winch negligently failed to remedy what petitioner assumed was an undue build-up of strain on the aft spring line caused by some movement of the ship. Petitioner's assumption of movement creating an undue strain was not supported by any evidence and flew in the face of (a) the written statement, offered by petitioner herself, of the crew member manning that winch, which said, "At no time did I notice any undue strain on the wire" (607 F.2d at 1036; Pet. App. A 7-a) and (b) the fact that all of the testimony at trial was that the vessel was moving laterally and evenly in toward the dock at the time of the accident (607 F.2d at 1035, 1036 and 1037; Pet. App. A 4-a, 7-a, 9-a and 10-a; Court of Appeals Appendix pages 216a—lines 15 to 17, 251a-24 to 252a-10).

Accordingly, in the Court of Appeals, petitioner sought to support her theory of undue strain by arguing that a "shear" might have pushed the Marine Duval away from the dock, thereby creating a strain that respondent negligently failed to remedy and which resulted in the line snapping. That claim too had no support in the record. As Judge Friendly wrote for the Court of Appeals (607 F.2d at 1036 and 1037; Pet. App. A 7-a and 10-a):

> However, there was no evidence that the ship, whose engines had been stopped, was in fact moving when the line parted, save for the nearly completed movement toward the dock engendered by the tugs, which, of course, would diminish rather than augment any strain on the line.
>
> * * *
>
> [P]laintiff's brief in this court makes an extended argument that the Marine Duval may have been propelled away from the dock by a current or "shear". [Footnote omitted.] Yet there was no evidence that there was any such current or shear, still less that anyone aboard the Marine Duval knew of it, and certainly none that this was known in time to pay

> out more line or that the probability of such a shear was so great as to require constant supervision of the line, even at a time when tension would be expected to decrease.

In this Court, petitioner seeks to support her theory of movement by claiming, for the first time in this case, that, at the time of the accident, the spring lines were being used for the purpose of moving the Marine Duval aft. In an effort to support this new claim, petitioner has alluded a number of times to testimony having to do with where the vessel might have been some time prior to the accident, when the spring lines were placed on the bollard. However, with particular reference to the time of the accident, as Judge Friendly noted, the only testimony was to the effect that the Marine Duval was moving laterally and evenly in toward the dock (251a-19 to 252a-10), without any forward or aft movement that could be recalled by Chief Mate Hoffman (216a-16, 252a-2) or by Captain Newman (306a-14 to 17, 353a-13 to 354a-9) or by anyone else, and that it had reached a position only one or two feet off the dock (215a-18).[1] Petitioner's vigorous effort to twist the time frame to support the theory newly advanced here is simply not supported by the record. Since there was no evidence of movement against the line at the time of the accident, it is clear that, even if this contention had been raised in a timely fashion, it would not have altered the result below.

Even if the petitioner's speculative new theory of movement were to be accepted *arguendo,* there would still be no evidence that any movement of the vessel created an undue strain on the aft spring line of which the respondent was or should have been aware. This fact provided the Court of Appeals with an alternative basis for its opinion (607 F.2d at 1038; Pet. App. A at 11-a):

> Even if the ship moved, as Captain Newman hypothesized, this would not cast the Marine Duval in

[1] Contrary to petitioner's suggestion (Pet. at 51), there was no evidence that the bow thruster was being used to move the vessel off the dock, against the pressure of the tugs, at the time of the accident.

> negligence absent proof of a duty to anticipate the movement or a failure properly to respond to it. . . . Such evidence was wholly lacking.

See also Ianuzzi v. *South African Marine Corp., Ltd.,* 510 F.2d 950, 955 (2d Cir. 1975); *Rice* v. *Atlantic Gulf & Pacific Co.,* 484 F.2d 1318, 1320 (2d Cir. 1973).

There is simply nothing to contradict the statement, previously noted above, of the man who was handling the aft spring line, ABS Hardwick Cooper, that at no time did he see any undue strain on the line. After a thorough review of all the evidence, Judge Friendly understandably concluded (607 F.2d at 1039; Pet. App. A at 14-a) that:

> Here, as in *Marvin* [v. *Central Gulf Lines, Inc.,* 554 F.2d 1295 (5 Cir. 1977), *cert. denied,* 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978)], there is no evidence that the crew of the Marine Duval did anything they should not have done or failed to do anything they should have done.

Despite the utter lack of evidence of negligence, petitioner urges that the Court of Appeals erred in directing judgment notwithstanding the verdict. In so doing, petitioner has chosen to ignore the simple facts proved at trial and to attempt to construct this new, speculative and highly tenuous theory of causation.

The cases of *Schulz* v. *Pennsylvania R.R. Co.,* 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956) and *Tennant* v. *Peoria & Pekin Union Ry. Co.,* 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944), are cited and heavily relied upon by petitioner (Pet. at 24-29) as though they require a reversal. However, the teaching of those cases is unique to Jones Act and F.E.L.A. cases, deriving as it does from statutory language that makes the employer liable for injuries caused "in whole or in part" by its negligence and thereby eases the burden of proof of causation. 45 U.S.C. §51. *See Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). The rule has no application in ordinary negligence cases such as the instant one.

In any event, this case does not even present the issue advanced by petitioner, since there was no evidence at all from which the jury could infer negligence. In *Schulz* and *Tennant,* the defendant's negligence was shown and the only question was whether there was sufficient evidence to permit the jury to find any causal connection whatsoever between that negligence and the plaintiff's injury. In the present case, there was not only no evidence of causation, but Judge Friendly also found that petitioner had failed to present any evidence from which a jury could find that respondent had been negligent. (607 F.2d at 1039; Pet. App. A 14-a). The same result—dismissal of the action—would obtain even under the more stringent test of the F.E.L.A. *See Moore* v. *Chesapeake & Ohio Ry. Co.,* 340 U.S. 573, 71 S.Ct. 428, 95 L.Ed. 547 (1951). As stated by the court in *Perry* v. *Morgan Guaranty Trust Co. of N.Y.,* 528 F.2d 1378, 1380 (5th Cir. 1976), in a Jones Act case:

> That only the slightest negligence need be shown to uphold the award of damages in such cases does not mean, however, that the seaman may prevail on no evidence at all.

Petitioner's case is not aided by invocation of the doctrine of *res ipsa loquitur,* whether urged in Latin or in English. (Pet. at 32-53). Reliance on this doctrine was specifically disavowed by petitioner below (*see* 607 F.2d at 1037 n. 5; Pet. App. A at 8-a n.5) and would, in any event, be unavailing under *Herdman* v. *Pennsylvania R.R. Co.,* 352 U.S. 518, 520, 77 S.Ct. 455, 1 L.Ed.2d 508 (1957), in which this Court, in the course of affirming a directed verdict in an F.E.L.A. case, held that a jury verdict based upon *res ipsa loquitur* can be upheld only when there is evidence that the event causing the accident was so "unusual or extraordinary" that it compels the conclusion that the accident was caused by the defendant's negligence.

Here, to the contrary, Judge Friendly noted below (607 F.2d at 1037; Pet. App. A at 9-a) that:

> Chief Mate Hoffman's testimony suggested that unanticipated snapping of such wires—most of them presumably well maintained—was not infrequent.

Finally, contrary to petitioner's contention (Pet. at 58-65), this case does not present a conflict between the circuits as to the applicability to actions under the LHWCA of the sections of the *Restatement (Second) of Torts* dealing with invitees. *Compare Napoli* v. *Hellenic Lines, Ltd.,* 536 F.2d 505 (2d Cir. 1976) *with Santos* v. *Scindia Steam Navigation Co., Ltd.,* 598 F.2d 480 (9th Cir. 1979). In the present case, the Court of Appeals found that there was no evidence of negligence under a *general* land-based standard. The Court of Appeals did not have to consider whether or not the special land-based rules pertaining to invitees might apply, since those standards have no application when the accident occurs, as this one did, off the vessel. *Anderson* v. *Iceland S.S. Co.,* 585 F.2d 1142, 1148-1149 (1st Cir. 1978).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
February 5, 1980

Respectfully submitted,

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